STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

Illinois Public Telecommunications Association, an Illinois not for profit corporation	)	
	)	Docket No. 15-0254
Petition to determine whether Illinois local exchange carriers are in compliance with the Illinois Public Utilities Act and Section 276 of the Communications Act of 1934.	)	

AT&T ILLINOIS' BRIEF IN REPLY TO EXCEPTIONS OF THE IPTA AND STAFF

Illinois Bell Telephone Company d/b/a AT&T Illinois d/b/a AT&T Wholesale ("AT&T Illinois") respectfully submits this reply to the briefs on exceptions filed by the Illinois Public Telecommunications Association ("IPTA") and Staff. The Commission should deny the IPTA's Exceptions, which are yet another attempt to relitigate an issue that was fully litigated and decided long ago and as to which no relevant facts or law have changed. In addition, for clarity and completeness in rejecting the IPTA's arguments, the Commission should modify the Proposed Order with the language set forth herein.

INTRODUCTION

The IPTA's Petition seeks refunds of AT&T Illinois' payphone charges from 1997-2003, based on alleged new developments in the 2013 *FCC Declaratory Ruling*.[1] There are multiple fatal flaws in the IPTA's claim. First, the IPTA has already litigated its refund claim – and lost it – before this Commission,[2] the Illinois Appellate Court,[3] the FCC,[4] and the D.C. Circuit,[5] and

[1] Declaratory Ruling and Order, *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, 28 FCC Rcd. 2615 (rel. Feb. 27, 2013) ("*FCC Declaratory Ruling*") (Att. 8 to AT&T Illinois' Motion to Dismiss).

[2] Interim Order, *Investigation Into Certain Payphone Issues as Directed in Docket 97-0225*, Ill. C.C. Dkt. No. 98-0195, 2003 Ill. PUC LEXIS 912, *104-*108 (Nov. 12, 2003) ("*98-0195 Order*") (Att. 1 to AT&T Illinois' Motion to Dismiss).

exhausted all appeals of those decisions.[6] All told, the IPTA has raised the same refund claim *eleven* times in *six* forums, and lost every time. Multiple legal doctrines prohibit the IPTA's bid for a twelfth bite at the apple. Courts have developed these doctrines to bring finality to disputes once they are decided and prevent endless relitigation of the same claim. These doctrines include res judicata, collateral estoppel, the law of the case, and the prohibition on collateral attacks on final orders. As the Proposed Order finds (at 17), each of these doctrines, as well as the statute of limitations, bars the Petition here.

Second, the Petition rests on a misreading of the *FCC Declaratory Ruling*. Contrary to the IPTA's claim, the FCC did not suggest there was any problem with the Commission's denial of refunds of payphone rates. Rather, the FCC *rejected* the IPTA's request to preempt this Commission's decision to deny refunds based on state law, held that refund decisions are for each state alone to make, and found that the denial of refunds in Docket 98-0195 was perfectly permissible. The D.C. Circuit affirmed the FCC on all points on appeal. Far from supporting the IPTA's Petition, the FCC and D.C. Circuit decisions confirm that there is no federal-law barrier to the Commission's prior decision, and the IPTA does not (and could not) claim that the state law on which the Commission relied has changed.

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[3] *Illinois Public Telecommunications Assn. v. Illinois Commerce Comm.*, No. 1-04-0225, Order at 6-10 (Ill. App. 1st Dist., Nov. 23, 2005) ("*Illinois Appeal Decision*") (Att. 3 to AT&T Illinois' Motion to Dismiss).

[4] *FCC Declaratory Ruling*, ¶ 41.

[5] *Illinois Public Telecommunications Assn. v. FCC*, 752 F.3d 1018, 1022-25 (D.C. Cir. 2014) (Att. 9 to AT&T Illinois' Motion to Dismiss).

[6] *See* Atts. 2, 4-7, and 10-11 to AT&T Illinois' Motion to Dismiss.

BACKGROUND

A. Section 276 and Payphone Rates

Section 276 of the federal Telecommunications Act of 1996 ("1996 Act") bars a Bell Operating Company ("BOC") from discriminating in favor of its affiliated payphone service. 47 U.S.C. § 276(a)(2). As part of implementing Section 276, the FCC adopted a pricing standard – known as the "New Services Test" (or "NST")[7] – to govern the rates that BOCs charge unaffiliated payphone service providers ("PSPs") for the telephone lines that the PSPs use to connect to the local network. But the FCC did not apply the New Services Test itself. Rather, it elected to "rely on the states to ensure that the basic payphone line is tariffed by the LECs in accordance with the requirements of Section 276."[8] The FCC thus preserved states' authority to regulate basic payphone line tariffs, while requiring them to apply a federal pricing standard in reviewing those rates.

B. Illinois Decisions Rejecting Refunds

In May of 1997, the IPTA filed a petition asking the Commission to determine whether AT&T Illinois' payphone rates complied with the New Services Test and, if not, to award refunds to the IPTA's members for the period between April 1997 and whenever new rates took effect. *98-0195 Order*, 2003 Ill. PUC LEXIS 912, at *93-*94. That was Docket 97-0225. In December of 1997, the Commission instead decided to open its own investigation into payphone rates. This became Docket 98-0195.

After an extensive proceeding, the Commission ruled in November 2003 that AT&T Illinois' rates did not comply with the New Services Test and should be reduced going forward.

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[7] Report and Order, *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996,* 11 FCC Rcd. 20541 (1996) ("*First Payphone Order"*).

[8] Order on Reconsideration, *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996,* 11 FCC Rcd. 21233 (1996) ("*Payphone Reconsideration Order"*).

The Commission also held, however, that the filed rate doctrine and the rule against retroactive ratemaking barred any refunds to the IPTA for the difference between the new rates and the rates that had been in place from 1997 to 2003. Relying on the U.S. Supreme Court's decision in *Arizona Grocery Co. v. Atchison, T. & S.F. Ry. Co.*, 284 U.S. 370 (1932) and the Illinois Supreme Court's decisions in *Independent Voters of Illinois v. Illinois Commerce Comm.*, 117 Ill.2d 90 (1987) and *Mandel Bros., Inc. v. Chicago Tunnel & Terminal Co.*, 2 Ill.2d 205 (1954), the Commission found that (i) it had previously approved AT&T Illinois' tariffed payphone rates at least twice, (ii) "[a]n approved rate 'cannot be held to be excessive,'" and, therefore, (iii) granting refunds "would be directly contrary to the statutory requirement that a carrier charge only its tariffed rates." *98-0195 Order*, 2003 Ill. PUC LEXIS 912, at *104, citing *Independent Voters*, 117 Ill.2d at 97 and *Mandel Bros.*, 2 Ill.2d at 209. Thus, the Commission held, "there is no legal basis for ordering a refund" and doing so "would necessarily be contrary to Illinois law and the Supreme Court's holding in *Arizona Grocery*." *Id*. at *107. The Commission also denied rehearing.

The IPTA appealed the Commission's decision, again arguing that it was entitled to refunds for the period between 1997 and 2003. *Illinois Appeal Decision* at 1, 8. The Appellate Court rejected that argument, agreeing with the Commission that the filed rate doctrine and the rule against retroactive ratemaking barred any refunds. As the Court explained, the Commission had previously approved AT&T Illinois' payphone rates (*id*. at 3), meaning that AT&T Illinois was both legally entitled and legally obligated to charge only those rates from 1997 to 2003, and the federal and state Supreme Court decisions in *Arizona Grocery* and *Mandel Bros.* therefore prohibited refunds from those rates. *Id*. at 6-8. The Court rejected the IPTA's view that Section 276 required refunds, finding that federal law left refund issues to the states. *Id*. at 8-9.

The IPTA asked the Appellate Court to reconsider, vacate, or stay that decision and refer the issues to the FCC, but the Court denied that request. The IPTA then asked the Illinois Supreme Court to review the Appellate Court's decision, but the court denied the IPTA's request. The IPTA then asked the U.S. Supreme Court to take the case, but it too refused.

C. Federal Decisions Upholding Denial of Refunds

That should have been the end of the matter. While the state appellate process was proceeding, however, the IPTA pursued a parallel challenge to the Commission's *98-0195 Order* by filing a petition for declaratory ruling at the FCC. The IPTA asked the FCC to preempt the Commission's decision and hold that Section 276 and the FCC's orders make refunds mandatory. Payphone associations from other states that denied refunds filed similar petitions.

The FCC denied the IPTA's and other state payphone associations' requests, holding that Section 276 does not mandate refunds simply because a rate exceeds the level allowed by the New Services Test. *FCC Declaratory Ruling*, ¶ 41. Rather, the issue of whether to order refunds was left to the states, which are free to deny refunds if they so choose:

> [W]e reject the [payphone providers'] arguments that section 276 provides them with an absolute right to refunds in the cases before us. Although section 276 establishes requirements for payphone rates, it does not dictate whether refunds are due under any given set of circumstances. . . . *[I]n deciding whether to award refunds, the state commissions properly looked to applicable state and federal law and regulations, and decided, for reasons specific to each state's analysis, not to order refunds. In Illinois, the ICC based its rejection of refunds on the Illinois filed tariff doctrine and the IPTA's failure to file a formal complaint. . . . Although these decisions deny refunds in situations where a BOC's rates were not NST-compliant by April 15, 1997, they are not inconsistent with the Commission's orders and regulations implementing section 276 of the Act.*

Id. (emphasis added).

The IPTA appealed to the D.C. Circuit, arguing that the FCC's refusal to override the states and require refunds violated Section 276, and that the filed rate doctrine could not bar refunds. *IPTA v. FCC*, 752 F.3d at 1022. The court rejected the IPTA's arguments, finding that "a state commission or state court decision that considers a Section 276 claim and denies refunds – as happened in [Illinois] – is not inconsistent with the FCC's regulations and is not preempted." *Id*. at 1024. The court also noted that the filed rate doctrine and the prohibition on retroactive ratemaking are longstanding tenets of telecommunications law, "so it hardly seems unreasonable or arbitrary for the FCC to allow states" to deny refunds based on those principles. *Id*. at 1025. The IPTA moved for rehearing and rehearing *en banc* of that decision, but the D.C. Circuit refused. The U.S. Supreme Court then rejected the IPTA's petition for certiorari.

D. The IPTA's Petition Here

Ten years after the Illinois Appellate Court's decision upholding the Commission and denying the IPTA's refund request, and more than two years after the FCC decision upholding the Commission and denying the IPTA's refund request, the IPTA filed its Petition here, seeking the very same refunds on the very same theory. The IPTA appears to believe that losing the issue at the FCC and D.C. Circuit somehow changed the law in its favor.

Both AT&T Illinois and Staff moved to dismiss the Petition. The Proposed Order agrees with their arguments and recommends dismissal. The IPTA's Exceptions cast no doubt on the propriety of the Proposed Order's recommendation.

REPLY TO EXCEPTIONS

I. Reply to IPTA's Exceptions

A. Reply to IPTA Exception I

The IPTA contends in Exception I that the Illinois Supreme Court's recent decision in *Price v. Philip Morris, Inc.*, 2015 IL 117687 (Nov. 4, 2015) requires the IPTA to take its claim to the Appellate Court that affirmed the Commission's denial of refunds in 2005, and therefore this proceeding should be dismissed as moot. IPTA BOE at 1; IPTA Proposed Order at 14. The IPTA is wrong. The *Price* decision is inapplicable here and, in any event, requires no such thing.

First, *Price* dealt with a motion filed in circuit court under 735 ILCS 5/2-1401 (regarding relief from final court judgments). The IPTA did not file its Petition under Section 2-1401 nor does Section 2-1401 apply in Commission proceedings. Rather, the IPTA's Petition invoked the Commission's jurisdiction under 220 ILCS 5/10-108 (regarding complaints at the Commission) and 83 Ill. Admin. Code § 200.900 (dealing with reopening a case after the time for rehearing has passed). *See* Petition at 1. The Commission has full authority to administer those provisions and rule on the motions to dismiss the Petition. The Proposed Order properly applies those provisions by finding that various legal doctrines bar any complaint under Section 10-108 and that no facts or law have changed that would warrant reopening under Commission Rule 200.900. Proposed Order at 16-19. The decision in *Price* has no bearing on the Commission's review of a Petition filed under Section 10-108 and Rule 200.900.

Second, even if Section 2-1401 could apply here, the IPTA misreads *Price*. In *Price* the plaintiff won at the trial level but then lost in the appellate court. The plaintiff later went back to the trial court, based on alleged new evidence, and filed a motion under Section 2-1401 seeking a different result. Since the trial court had actually ruled in the plaintiff's favor the first time

around, however, the Section 2-1401 motion necessarily asked the *trial court* to reverse the *appellate court's* prior decision. *Price,* 2015 IL 117687 at ¶ 27. The Illinois Supreme Court held that was unlawful because a lower court has no authority to reverse an appellate court. *Id.* at ¶¶ 27, 37-45. Rather, the court explained, a party seeking to undo an appellate court decision must ask the appellate court to recall its mandate. *Id.*, ¶ 2.

The facts here are exactly the opposite. Unlike in *Price,* the IPTA did not win at the Commission and then lose on appeal, and it is not asking the Commission to reverse the appellate court. To the contrary, the IPTA lost at both levels and its Petition asks *the Commission* to reverse *its own* prior decision in Docket 98-0195. *Price* states that when a party seeks vacatur of a decision rendered at the trial court level (which by analogy would be the Commission), that party should seek relief from the trial court itself – even if the trial court's decision has already been affirmed by a reviewing court:

> When a petitioner seeks relief from the final judgment of a circuit court under section 2-1401, the petition must be filed in the circuit court in which the contested judgment was entered. . . . This is true even if the original circuit court judgment was affirmed on appeal before the petitioner filed the section 2-1401 petition.

Id., ¶¶ 25-26. Applying the logic of *Price* here, nothing precludes the Commission from ruling on the IPTA's Petition asking *the Commission* to reverse *its own* final judgment in Docket 98-0195. (Of course, as AT&T Illinois, Staff and the Proposed Order have shown, the Commission should deny that request.)

It is clear that the IPTA is misreading *Price* in hopes of avoiding an adverse order by switching to a different forum. But *Price* provides no justification for allowing the IPTA to avoid a ruling on its Petition – a Petition that invoked the Commission's jurisdiction, relied on laws administered by the Commission, and challenged a Commission order. The Commission should finish what the IPTA started and complete its decision by upholding the Proposed Order.

B. Reply to IPTA Exceptions II-IV

In its Exception II, the IPTA contends that the Proposed Order fails to "offer[] any rationale establishing that the action is barred." IPTA BOE at 2. The IPTA's Exceptions III and IV similarly contend that the Proposed Order misunderstands the nature of a motion to dismiss and fails to explain its conclusions.

The IPTA must not have read the Proposed Order, and its arguments ignore the basic standards for a motion to dismiss. The Proposed Order expressly finds that the IPTA's claim is "barred by the doctrines of res judicata, collateral estoppel, improper collateral attack, law of the case, and by the statute of limitations"; that the Commission's prior "decision to deny such refunds [to the IPTA] in Docket 98-0195 was proper" and unaffected by any later events or decisions; and that there is no basis for reopening Docket 98-0195 because "no conditions of fact or law have so changed that would warrant reopening[]." Proposed Order at 16-19. Thus, the Proposed Order explained that the IPTA's claim is barred as matter of law for several independent reasons.

The Commission undeniably has authority to dismiss claims that are barred as a matter of law by doctrines of finality, and there is no doubt that the doctrines of collateral estoppel, res judicata, law of the case, and the prohibition on collateral attacks on final orders apply here. The IPTA has fully litigated its request for refunds against AT&T Illinois in the Commission, on appeal, and by attacking those decisions at the FCC and in the D.C. Circuit. The IPTA's arguments have been the same at every stage and the outcome has been the same at every stage, and none of the factual or legal bases for those decisions has changed. As the Commission has frequently recognized, collateral attacks on final, non-reviewable orders should be dismissed at the outset. *Illini Coach Co. v. Illinois Commerce Comm.*, 408 Ill. 104, 111-14, 96 N.E.2d 518

(1951) (party could not file a complaint that collaterally attacked a final Commission order); *Peoples Gas, Light and Coke Co. v. Buckles*, 24 Ill.2d 520, 528, 182 N.E.2d 169 (1962) (party could not collaterally attack Commission order via state-court lawsuit); *Albin v. Illinois Commerce Comm.*, 87 Ill. App. 3d 434, 436-38, 408 N.E.2d 1145 (4th Dist. 1980) (Commission order in prior case "still stands, unreversed and unmodified," and was not subject to collateral attack in later case); *Cbeyond Commc'ns v. Illinois Bell Tel. Co.*, Ill. C.C. Dkt. No. 11-0696, 2013 WL 1701621, at *8-*9 (Mar. 27, 2013) (dismissal of impermissible collateral attack on prior Commission order because Cbeyond sought to relitigate points that necessarily were decided in the prior proceeding); *City of Chicago v. Commonwealth Edison Co.*, Ill. C.C. Dkt. No. 96-0360, 1997 WL 33771836 (May 7, 1997) (complaint dismissed as being "a clear attack on previous decisions made by this Commission," in that it raised issues the City itself had raised (and lost) in ComEd's prior rate case, and that "[a]lmost every point raised in the [City's] complaint . . . has been decided in other dockets.").[9]

The IPTA has had (and used) every chance to challenge the *98-0195 Order* through the avenues allowed by Illinois law and the Public Utilities Act (and through the federal system as well). As the Proposed Order recognizes, as a matter of law the IPTA cannot relitigate the settled issue yet again.

There is no basis whatsoever for the IPTA's claim that there are laws and cases that require the Commission to proceed even when a claim is barred by such doctrines of finality (*id.* at 6-7). Nothing prohibits the Commission from finding that claims are barred as a matter of law by such doctrines of finality and the statute of limitations. Indeed, the IPTA concedes that

[9] *See also Citizens for a Better Environment v. West Suburban Recycling and Energy Center*, Ill. C.C. Dkt. No. 94-0360, 1995 WL 17200502 (Jan. 25, 1995); *Citizens for a Better Environment v. Robbins Resource Recovery Co.*, Ill. C.C. Dkt. No. 94-0361, 1995 WL 16778269 (Dec. 21, 1994); *Citizens for a Better Environment v. Chewton Glen Energy, Inc.*, Ill. C.C. Dkt. No. 94-0362, 1995 WL 17200503 (Feb. 23, 1995); *Citizens for a Better Environment v. Illinois Wood Energy Partners, L.P.*, Ill. C.C. Dkt. No. 94-0363, 1995 WL 17200504 (Apr. 12, 1995).

dismissal is proper where "no set of facts can be proved that would entitle the plaintiff to recover." Motion at 4; IPTA Reply to Motions to Dismiss at 4; *Village of East Dundee v. Commonwealth Edison Co.*, Ill. C.C. Dkt. No. 13-0450, 2014 WL 134338, at *9 (Mar. 25, 2014) (dismissing complaint where pleadings showed plaintiff could prove no set of facts that would entitle it to relief). As the Proposed Order finds, that is the situation here – in light of the prohibition on improper collateral attacks, etc., there is no possible set of facts that would allow the IPTA to prevail.

The IPTA also contends that all it has to do to avoid dismissal is assert a cause of action. IPTA BOE at 2-5. But that is not the law. To defeat a motion to dismiss, a plaintiff must show it has stated a cause of action on which relief can be granted – that is, one that is not barred by legal rules or doctrines or for other reasons. For example, it does not matter if a party states a cause of action if that action is prohibited as a matter of law by doctrines such as improper collateral attack, collateral estoppel, res judicata, or law of the case, or by the statute of limitations.

Moreover, even if the doctrines of finality and statute of limitations do not bar consideration of the IPTA's petition (and they do), that petition must nevertheless be dismissed because the undisputed facts and the law upon which the Commission and Appellate Court relied to deny IPTA's refund request have not changed and continue to mandate rejection of IPTA's refund request. As Staff correctly points out in its brief on exceptions (pp. 1-3), Illinois' filed rate doctrine, as codified in section 9-240 of the Illinois Public Utilities Act, bars refunds given the undisputed fact that the rates the IPTA alleges to have been excessive, and from which it seeks refunds, were approved by the Commission at least twice, and were tariffed.

Finally, contrary to the IPTA's claim, the Proposed Order does not recommend dismissal simply because the ALJ thinks the IPTA would likely lose on the merits. IPTA BOE at 2, 7. Rather, it finds that, as a matter of law, the IPTA could never win on the merits, even if every fact it alleges were true, because the legal premise of the IPTA's claim – *i.e.*, that the FCC's 2013 declaratory ruling changed the law and requires refunds – is not true. Proposed Order at 16. When the legal premise of a claim is not true there is no point in wasting everyone's time and resources by allowing the claim to proceed. This is precisely why motions to dismiss exist – to allow courts, agencies, and defendants to avoid wasting their time and resources on claims that could never prevail. *See* 30 Illinois Law and Practice, Pleadings, § 87 at 159-60 (2010) ("A motion for judgment on the pleadings [such as a motion to dismiss] is appropriate where the pleadings disclose no genuine issue of material fact and the movant is entitled to judgment as a matter of law, or where, under the conceded facts, a judgment different from that pronounced could not be rendered, notwithstanding any evidence which might be produced.").[10]

C. Reply to IPTA Exception V

In its Exception V, the IPTA contends that the law has changed and so the Proposed Order erred in not reopening Docket 98-0195. IPTA BOE at 11. The law has not changed. As explained in more detail in AT&T Illinois' and Staff's prior briefs, in the *FCC Declaratory Ruling* that IPTA relies on the FCC *rejected* the IPTA's position that federal law preempts this Commission's decision to deny refunds, and upheld the Commission's right to deny refunds based on the Commission's application of relevant state or federal law. *FCC Declaratory*

[10] The Proposed Order also correctly finds (at 17) that the Petition is barred by the statute of limitations. The IPTA takes exception, arguing that this case merely continues Docket 98-0195. IPTA BOE at 8. The IPTA is incorrect. The only way to revisit a closed proceeding is via reopening pursuant to Rule 200.900. If the IPTA's Petition is deemed a request for reopening under Rule 200.900, the IPTA cannot meet the requirements of that Rule. If the Petition is instead deemed to be a Complaint it would necessarily be opening a new proceeding, in which case it would be barred by the two-year limitations period in 47 U.S.C § 415.

Ruling, ¶ 41. As the FCC explained, "[n]othing in the record here persuades us that the state commissions [that denied refunds] misapplied federal or state law or regulations, or established requirements that are inconsistent with the Commission's regulations." *Id.*, ¶ 40.[11] The D.C. Circuit likewise held that denying refunds was "not inconsistent with" federal law and that it was not unreasonable to deny refunds based on the filed rate doctrine and rule against retroactive ratemaking, which are "central tenet[s] of telecommunications law." *IPTA v. FCC*, 752 F.3d at 1024-25. Both the FCC and the D.C. Circuit agreed that each state can decide for itself whether refunds are appropriate – which is exactly what the Commission understood the law to be when it issued its decision in Docket 98-0195. *IPTA v. FCC*, 752 F.3d at 1022-25.

Moreover, the IPTA's entire argument is based on the erroneous assertion that the Commission's decision in Docket 98-0195 to deny refunds, and the Appellate Court's opinion affirming that decision, were based solely on *federal* law. Based on this erroneous assertion, IPTA argues that because the FCC subsequently stated that federal law neither requires nor bars the states from granting refunds (but rather leaves that decision to each state), the Commission can and should reconsider its decision in Docket 98-0195. IPTA BOE at 11. In fact, however, the Commission and Appellate Court, relying on *state* law, and citing two *state* court cases[12] interpreting *state* law, held that requiring refunds would "be contrary to *Illinois* law" because it would be contrary to the "statutory requirement [in 220 ILCS 5/9-240] that a carrier charge only its tariffed rates." *98-0195 Order*, 2003 Ill. PUC LEXIS at *104, *107; *Illinois Appeal Decision*

[11] *Accord*, *FCC Declaratory Ruling*, ¶ 1 ("the state commissions' decisions [that denied refunds] were not inconsistent with the Commission's regulations"), ¶ 37 (state decisions denying refunds "are not inconsistent with the Commission's regulations"), ¶ 41(state decisions denying refunds "are not inconsistent with the Commission's orders and regulations implementing section 276"), ¶ 42 (state decisions denying refunds are "not inconsistent with the statute and the approach the Commission formulated in the *Payphone Reconsideration Order*").

[12] *Independent Voters* and *Mandel Bros.* (*see 98-0195 Order*, 2003 Ill. PUC LEXIS 912, at *104-*108, and *Illinois Appeal Decision* at 6-10).

at 9. The IPTA does not, and cannot, argue that the FCC's decision created a change in *state* law. The IPTA's continued assertions that its loss at the FCC somehow supports its Petition in this case is completely irrational and ignores both the independent state-law basis for the Commission's and Appellate Court's prior denial of refunds and the FCC's and D.C. Circuit's refusal to disturb the Illinois rulings.

D. The Final Order Should Include Language Denying the IPTA's Motion for Reconsideration and the IPTA's Motion to Withdraw Petition

Subsequent to the Proposed Order the IPTA filed a "Motion to Reconsider" the Proposed Order and a "Motion to Withdraw Petition" based on the *Price* case discussed above. The arguments in the IPTA's Brief on Exceptions repeat the arguments in those motions. The final Order therefore should include language denying those motions for the reasons set forth above and in AT&T Illinois' responses to the motions. Specifically, the Commission should include the following language just prior to the start of section IX on page 18 of the Proposed Order:

> After the Proposed Order was issued, the IPTA filed a Motion to Reconsider that decision. We deny that motion. First, a motion to reconsider a proposed order is procedurally improper. Nothing in the Public Utilities Act or the Commission's rules authorizes a motion to reconsider a *proposed* order, because at that stage in the case there is no actual "order" to "reconsider." Rather, the longstanding, Commission-established method for seeking changes to a *proposed* order is by filing a "Brief on Exceptions" in accordance with the requirements of 83 Ill. Admin. Code § 200.830.
>
> Moreover, allowing parties to file motions to "reconsider" a proposed order would set a bad precedent by opening the door to parties in every case filing both exceptions to and motions to reconsider a proposed order. All that would do is unnecessarily increase the cost, burdens, and delay for opposing parties, Staff, and the Commission, for no benefit. If a party disagrees with a proposed order it can make all its arguments in a single brief on exceptions. Allowing other kinds of filings would create administrative inefficiency. Indeed, we note that the arguments in the IPTA's Motion to Reconsider are a virtual cut-and-paste copy of the arguments in the IPTA's Brief on Exceptions. There is nothing to be gained by such duplication.
>
> Second, even if such a motion were permissible, the IPTA's Motion to Reconsider is denied for all of the reasons stated above in our analysis of the IPTA's claim.
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> After the Proposed Order came out, the IPTA also filed a Motion to Withdraw its Petition. We deny that motion. As the Commission has held in the past, there is no requirement

to allow a party to unilaterally withdraw a petition after an adverse proposed order has been issued. *Re Illinois-American Water Co.*, Ill. C.C. Dkt. No. 02-0517, 2003 WL 22319270, at *2 (Sept. 16, 2003); *Cbeyond Commc'ns, LLC. v. Illinois Bell Tel. Co.*, Ill. C.C. Dkt. No. 10-0188. Order at 35 (July 7, 2011). Rather, the Commission has discretion to decide whether to allow withdrawal, and in doing so will consider, among other things, the prejudice to the opposing parties and the time and effort expended on the case. Here the IPTA seeks to withdraw so it can make the same basic claim in a different forum (the Appellate Court). Allowing withdrawal after a proposed order has issued, simply so the IPTA can pursue the same issue in a different forum, would be unfairly prejudicial to AT&T Illinois, which has expended considerable time and effort in briefing every aspect of the IPTA's claim – a claim that, as discussed above, has already been decided multiple times in multiple fora and should never have been brought in the first place. Allowing withdrawal also would render meaningless the efforts of Staff and the Commission in considering the IPTA's repetitive claim. If the IPTA wanted to ask the Appellate Court to reconsider its prior decision it could have attempted to seek relief there instead. But it chose to come to the Commission. Having done so, we find it is improper to allow the IPTA to withdraw its Petition at the eleventh hour to avoid an adverse ruling.

Furthermore, the IPTA's main basis for seeking withdrawal is its argument that the Illinois Supreme Court's recent decision in *Price v. Philip Morris, Inc.*, 2015 IL 117687 (Nov. 4, 2015) requires it to take its claim to the Appellate Court that affirmed the Commission's denial of refunds in 2005. The *Price* decision, however, is irrelevant here.

Price dealt with a motion filed in circuit court under 735 ILCS 5/2-1401. The IPTA did not file its Petition under Section 2-1401 nor does Section 2-1401 apply in Commission cases. Rather, the IPTA invoked the Commission's jurisdiction under 220 ILCS 5/10-108 (regarding complaints at the Commission) and 83 Ill. Admin. Code § 200.900 (dealing with reopening a case after the time for rehearing has passed). *See* Petition at 1. The Commission has full authority to administer those provisions and rule on the motions to dismiss the Petition. The decision in *Price*, which dealt with the application of Section 2-1401 in unique circumstances, has nothing to do with the application of Section 10-108 and Rule 200.900.

In addition, even if Section 2-1401 could apply here, the IPTA misreads *Price*. In *Price* the plaintiff won at the trial level but then lost in the reviewing court. The plaintiff later went back to the trial court, based on alleged new evidence, and asked that court to reverse the appellate court's decision. *Price*, 2015 IL 117687 at ¶ 27. The Illinois Supreme Court said that was improper because the plaintiff was necessarily asking the *trial court* to reverse the *appellate court* (since the plaintiff had actually won at the trial court level), and a lower court has no authority to reverse an appellate court. *Id*. at ¶¶ 27, 37-45. Rather, a party seeking to undo an appellate court decision must ask that court to recall its mandate. *Id*., ¶ 2.

The situation here is the opposite. The IPTA did not win at the Commission and then lose on appeal, and it is not asking the Commission to reverse the appellate court. To the contrary, the IPTA lost at both levels and in its Petition asks *the Commission* to reverse its *own* prior decision in Docket 98-0195. *Price* states that when a party seeks vacatur of a decision rendered at the trial court level (which by analogy would be the Commission), that party should seek relief from the trial court itself – even if the trial court's decision has already been affirmed by a reviewing court:

> When a petitioner seeks relief from the final judgment of a circuit court under section 2-1401, the petition must be filed in the circuit court in which the contested judgment was entered. . . . This is true even if the original circuit court judgment was affirmed on appeal before the petitioner filed the section 2-1401 petition.

Id., ¶¶ 25-26. Thus, even under *Price* nothing precludes the Commission from ruling on the IPTA's Petition, which asks *the Commission* to reverse its *own* final judgment in Docket No. 98-0195. (Of course, as AT&T Illinois and Staff have shown, the Commission should deny that request.) Accordingly, nothing in *Price* requires the Commission to allow the IPTA to withdraw its Petition.

The Findings of Fact and Conclusions of Law in the final Order also should state that the IPTA's motions are denied.

II. Reply to Staff's Exceptions

A. Reply to Staff Exception No. 1

Staff Exception No. 1 proposes language to amplify and clarify the reasoning in the Proposed Order regarding the effect of 220 ILCS 5/9-240 and the state filed rate doctrine. AT&T Illinois supports these additions, with one slight change. For the purpose of clarity and to avoid future disputes about what the FCC did or implied, Staff's proposed language at the bottom of page 3 of its Brief on Exceptions should be changed as follows. Staff proposes this language: "We concur. While the FCC might suggest that the filed rate doctrine is not a bar to the grant of refunds, Section 9-240 is." AT&T Illinois proposes the following, more direct language instead: "We concur. Section 9-240 bars the refunds the IPTA seeks."

B. Reply to Staff Exceptions Nos. 2 and 3.

AT&T Illinois supports Staff Exceptions Nos. 2 and 3.

CONCLUSION

For the reasons stated here and in AT&T Illinois' other briefs in this case, the Commission should reject all of the IPTA's exceptions, modify the Proposed Order as suggested above, and dismiss the Petition with prejudice.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned, an attorney, hereby states that he caused copies of the foregoing document to be served electronically on the following persons on November 13, 2015.

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